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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FRANCIS A. SIMPSON, JR., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Francis A. Simpson, Jr., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 12, 1964.

CITATION TO OPINION BELOW

There was no opinion by the United States District Court. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, pg. 2a, is reported in — F. 2d —.*

* The opinion has not yet been reported in the advance sheets of the Federal Reporter System.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 12, 1964 (R. Vol. V, pg. 23). On November 9, 1964 an application was made to the Honorable Earl Warren, Chief Justice of this Court for an extension of time within which to file a petition for writ of certiorari in this cause. On November 18, 1964 the Chief Justice executed an order extending the time within which to file a petition for writ of certiorari in this cause to and including November 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under the peculiar circumstances of this case was petitioner fairly tried and convicted of conspiracy and unlawful use of interstate facility for transmission of bets and wagers, where there was a complete lack of any evidence with respect to the substantive offenses and insufficient evidence as to the alleged conspiracy to commit these offenses.

STATUTES INVOLVED

The statutory provisions involved are the Act of June 25, 1948, c. 645, 62 Stat. 701; U.S.C., Title 18, § 371, and the Act of September 13, 1961, Pub. L. 87-216, § 2, 75 Stat. 491; U.S.C., Title 18, § 1084(a). They are printed in Appendix A, infra, pg. 1a.

STATEMENT

On March 16, 1963, petitioner, Francis A. Simpson, Jr., and a co-defendant, Langhorne Carter Rorer,[1]

[1] Langhorne Carter Rorer's conviction was affirmed by the Fourth Circuit Court of Appeals at the same time as petitioner. On November 12, 1964 he filed a petition for writ of certiorari, No. 684.

were indicted in seven (7) counts by a Grand Jury of the United States District Court for the Eastern District of Virginia, Alexandria Division, charged with violations of U.S.C., Title 18, § 1084(a) and § 1952; conspiracy to violate these sections and a violation of U.S.C., Title 47, § 153 (R. Vol. 1, pp. 1-5). Following trial, petitioner and the co-defendant were convicted of conspiracy, and violation of § 1084(a) in two counts.[2] They were sentenced to imprisonment for three (3) years on the conspiracy count and two years on the two violations of § 1084(a), the sentences to run concurrently.

The evidence showed that Jerry Marcus of Brooklyn, New York was engaged in placing wagers on sporting events with Rudy Vozzola of Alexandria, Virginia, an admitted bookmaker (R. Vol. II, pp. 39-43, 76-77). At the time of the alleged commencement of the conspiracy, Vozzola was indebted to Marcus in the amount of $3,000. Marcus traveled to Washington, D. C., where Vozzola met him at the airport and took him to a restaurant in the District of Columbia where they met Langhorne C. Rorer, the co-defendant (R. Vol. II, pg. 43). At the meeting, which took place in August, 1963, Rorer gave Marcus his telephone number and told him that he could place bets with him (R. Vol. II, pp. 43-44). Thereafter, Marcus made several bets with Rorer by telephone from New York to Virginia (R. Vol. II, pg. 45).

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[2] At the conclusion of the Government's case-in-chief, the trial court entered judgment of acquittal on counts 2 and 3; the Government withdrew count 7 (violation of U.S.C., Title 47, § 153) After verdict, on motion, the Court struck count 4; thus leaving only convictions on counts 1, 5 and 6.

Vozzola, according to his testimony, telephoned Rorer at his home and laid off number bets with him (R. Vol. II, pp. 80-81).

In the fall of 1963, Marcus made a number of bets with Rorer by telephone from Brooklyn, New York to Alexandria, Virginia (R. Vol. II, pp. 49-50). Marcus testified that he talked to Rorer on the telephone at least twenty (20) times (R. Vol. II, pg. 63). As a result of these bets, Marcus owed Rorer $10,000. Rorer telephoned Marcus and attempted to collect this indebtedness (R. Vol. II, pg. 50).

Acting upon a search warrant for Rorer's home and automobile, agents of the Federal Bureau of Investigation seized certain gambling paraphernalia from his automobile.

For a period of an hour and a half following the arrest of Rorer, an agent of the Federal Bureau of Investigation monitored Rorer's telephone and received thirty-four (34) telephone calls. Only two of them could be said to be related to gambling (R. Vol. II, pp. 113-119).

On October 1, 1963, three months after the alleged conspiracy commenced, Marcus came to National Airport, Washington, D. C., to pay Rorer $1,250.00 (R. Vol. II, pg. 45). He was met at the airport by Rorer and Marcus entered the automobile, sitting in the front. Rorer was obviously driving (R. Vol. II, pp. 47-48). Marcus testified that petitioner herein, Simpson was in the back seat with another person; that " . . . and I think I gave it (the money) to Mr. Simpson and he counted it." They proceeded to a place in Washington,

D. C. (R. Vol. II, pg. 47). At this meeting Marcus made bets (R. Vol. II, pg. 48).[3]

Marcus, aside from this ride in the automobile, never saw or spoke to Simpson, either by telephone or in person, and never had any dealings with him of any description whatsoever.

Although Vozzola admitted laying off bets with Rorer, he testified that he had called Rorer's home and had on occasion spoken with Simpson. He made no bets with Simpson. Nor did he lay off any bets with or through Simpson (R. Vol. II, pp. 81-82). Vozzola did state that he considered Simpson a good handicapper on games and that, "he (Simpson) bets good." At what point of time Simpson was a good game handicapper or bet, the record does not disclose, although neither of these activities constitutes any criminal activity.

Of the two telephone calls which the agent monitored following the arrest of Rorer in his home, which might be described as being gambling calls, neither call involved Simpson, in any fashion.

Another witness, Gary Taylor, said that he had a conversation with Rorer in the fall of 1963 wherein Rorer indicated that he might take some football plays and inquired whether Taylor was going to do any betting (R. Vol. II, pg. 152).

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[3] Whether all the persons in the automobile were at this meeting is unknown. Marcus was asked by the prosecutor whether he made bets at this meeting with Rorer and Simpson. He answered that he did. But we don't know whom he made the bets with. Inferentially it had to be with Rorer whom he had been betting with before and thereafter. The evidence against Simpson on this point is contained in the question of the prosecutor, not the answer of the witness.

Simpson was arrested in his home on an arrest warrant by agents of the Federal Bureau of Investigation. At the time of his arrest, a search revealed nothing, except that the agent took some ashes from his fireplace. These were later identified as football pool cards, but unrelated to any activities of Marcus (R. Vol. II, pp. 191-192).

At trial, Simpson and Rorer were represented by the same counsel. On appeal, Simpson was represented by his trial counsel. The record discloses, that the motions for judgment of acquital were made jointly as to both defendants with no discussion of the evidence or lack of evidence as to each defendant. The record also discloses, that the argument to the jury by defense counsel failed to discuss any of the evidence or lack of it pertaining to Simpson, except general remarks as to the credibility of certain witnesses that could be considered as being applicable to both defendants (R. Vol. III, pp. 33-49).

It can only be assumed that the reason the trial Court did not grant motions for judgment of acquittal on the remaining counts as to Simpson was that defense counsel did not discuss the lack of evidence with respect to each defendant. The reason for affirmance by the Fourth Circuit Court of Appeals can only be speculated from a careful consideration of Simpson's brief and appendix, particularly, the statement of facts contained in his brief.

REASONS FOR GRANTING THE WRIT

1. While it is not the usual function of this Court to review the sufficiency of the evidence in a criminal case, the peculiar circumstances of this case, coupled with the complete lack of any evidence showing peti-

tioner's violation of U.S.C., Title 18 § 1084(a), and the patent insufficiency of the evidence with respect to Simpson's participation in the alleged conspiracy. this Court in its supervisory capacity as administrator of criminal justice in Federal Courts ought not to permit this conviction to stand.

Counts 5 and 6 of the indictment charged Simpson and the co-defendant with violating § 1084(a). Two elements of the crime are involved. First, Simpson had to knowingly use a wire communication facility for transmission (that is sending, *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.* (USDC N.D. Ill. E.D.—3 Judge Constitutional Court), 220 F. Supp. 621 at 638 (1963)) in interstate commerce of bets, wagers or information.

Simpson never talked to Marcus on the telephone or did he ever send or receive any wire message from him. In fact other than the ride in the automobile in Washington, D. C., four days before the alleged violations of Counts 5 and 6, Simpson never had anything to do with Marcus at all. Nor is there the slightest evidence of any description whatsoever that Simpson aided and abetted Rorer in any fashion whatsoever with respect to these substantive offenses.

In fact, the other element of the crime, to wit, that Simpson was engaged in the business of betting or wagering was never established. The fact that Vozzola said Simpson was a good handicapper on games and that, "he (Simpson) bet good," may make him a good bettor and a good game handicapper, but it doesn't mean that he is engaged in the business of betting or wagering. Does the Government really believe that because Simpson answered the telephone at Rorer's home when Vozzola telephoned, on occasion, (and

where no bets or lay offs were made with Simpson) that he was engaged in the business of betting or wagering on October 4 and 5, 1963 as charged in the indictment (R. Vol. I, pp. 4-5). *Kelly* v. *Illinois Bell Telephone Co.*, 7th Cir., 325 F. 2d 148 at 152.

The Government, in all candor, should admit not only that the evidence was insufficient, but there was NO EVIDENCE at all showing Simpson guilty of counts 5 and 6 of the indictment.

2. With respect to the conspiracy, the only evidence is that Simpson, three months after the alleged formation of the conspiracy with Rorer, and after Marcus had been betting with Rorer, rode in the rear seat of an automobile from National Airport, Washington, D. C. to a place in Washington, D. C. and Marcus, who was sitting in the front — Rorer was driving — thinks he gave the money he owned Rorer to Simpson and he counted it. This is the basis for allegedly establishing that Simpson entered a conspiracy with Rorer to violate U.S.C., Title 18, § 1084 and 1952.

Marcus made all of his bets with Rorer. At his first meeting with Rorer and Vozzola it was agreed that all pay-offs would be made personally. A month and a half later Simpson meets Marcus for the first time, in an automobile with Rorer and another person (R. Vol. II, p. 66). Thereafter Marcus continues to bet only with Rorer. As a result he owes Rorer, not Simpson, $10,000. When Marcus doesn't pay up, Rorer, not Simpson, telephones him and demands payment. The telephone number that Marcus uses is Rorer's phone located in his house, not Simpson's. The instructions to come to Washington, D. C. to make the pay-off are given by Rorer, not Simpson, who isn't even present. The evidence does not disclose any

knowing participation by Simpson in this alleged conspiracy. *Ingram* v. *United States,* 360 U.S. 672, 79 S.C. 1314, 3 L. ed. 2d 1503. Even in that case, Smith and Law had intimate connection with the gambling operation as employees, but the evidence failed to disclose the necessary element of knowledge of the conspiracy.

3. The evaluation of the representation afforded to petitioner, Simpson, is more properly a function of the judiciary, than it is of individual members of the bar. Great advancements have been made in providing indigents in Federal Courts with excellent representation, so that they may compete in criminal cases on the same level with wealthy defendants. But left to starve, so to speak, are that great mass of individuals who are neither wealthy nor indigent. They retain counsel quite often, simply on the basis that counsel is a member of the bar and open for business. It is unjust to hold them responsible for the conduct of their litigation, simply because they had sufficient monies to retain counsel. The responsibility must rest with the bar, and the judiciary.

In determining whether or not this case is sufficiently unusual as to require the Court's examination of the sufficiency of the evidence, we ask the Court to examine Appellant, Simpson's brief and appendix filed in the Fourth Circuit Court of Appeals, which is part of the record in this cause, with particular attention to the Statement of Facts contained therein. Examine also the motions for judgment of acquittal, during the trial, where the sufficiency of the evidence with respect to each defendant was not discussed, but rather the motion was made jointly and reliance was had on other matters. Examine, if you will, the argument to the

jury by counsel for both defendants, and determine what the jury was told with respect to the slight evidence that was introduced against Simpson.

We believe that the situation in this case is peculiarly unusual to the degree that this Court ought to grant petitioner's petition for writ of certiorari, or in the alternative, summarily grant said petition and vacate the judgment of the Court of Appeals with directions that the cause be re-briefed and re-argued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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